SUPREME COURT, U. S.

JUL 20 1967

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BRIEF FOR NORFOLK AND WESTERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

IN THE

Supreme Court of The United States

OCTOBER TERM 1967

No. 288

O. V. FOY,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,
BROTHERHOOD OF RAILROAD TRAINMEN,
BROTHERHOOD OF RAILROAD TRAINMEN,
LOCAL LODGE NO. 550,
JOHN JENNINGS, SECRETARY,
LOCAL LODGE NO. 550,
BROTHERHOOD OF RAILROAD
TRAINMEN,
and
JOHN CARTOS, PRESIDENT AND LOCAL
CHAIRMAN, LOCAL LODGE NO. 550,
BROTHERHOOD OF RAILROAD
TRAINMEN,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CORRECTION OF PETITIONER'S STATEMENT OF THE CASE AND OF THE QUESTIONS PRESENTED

The Petition misdescribes the case and the questions presented by it. This case turned entirely upon the exercise of judicial discretion, involving no question of consequence to any other case, in circumstances which made any different exercise of that discretion unthinkable.

Correct Statement of the Case

The plaintiff, a Negro yard brakeman, sued the international union which is his collective bargaining representative for compensatory and punitive damages, alleging racial discrimination against him in the promotion of yard brakemen to positions of yard conductor and car retarder operator throughout the thirty-nine years of his employment. For their alleged participation in this, he joined also his local lodge, two of its officers, and the railway company. The case arose prior to the effective date of the Civil Rights Act of 1964, and plaintiff's action was grounded entirely upon the alleged breach of the statutory duty of equal representation imposed on the union by the Railway Labor Act and the alleged participation therein by the other defendants.

In response to the original complaint all defendants replied that plaintiff had never invoked simple grievance procedures prescribed by laws of the union, of which plaintiff was a member, and by the applicable collective agreement. The union defendants made this defense by a Section 12 (b) (6) motion supported by affidavits which authenticated a union law requiring

any member aggrieved to furnish a written statement of his grievance to the secretary of his local lodge for consideration by the membership at its next regular meeting, and setting forth that plaintiff had never done this. Prior to the hearing on this motion, in response to a brief which had been filed for the plaintiff, the union defendants presented and the court received a further affidavit setting forth that similar grievances of other Negro employees had been effectively handled by the union when brought to its attention through this grievance procedure. The union defendants' motion was heard some three weeks after the filing of the last of these affidavits. Plaintiff having offered no counter affidavit to show that he could contradict the defendants' affidavits, the motion was heard on the facts thus established and was taken under advisement. When the district judge thereafter filed a memorandum to the effect that summary judgment against him would be entered, plaintiff sought and obtained leave to file an amended complaint setting forth reasons for not pursuing his administrative remedies.

By his amended complaint plaintiff alleged that his reasons for not pursuing the remedies prescribed by the union constitution were as follows: (1) that he did not resort to such procedures before 1955 because until that time he was not a member of the union, having been excluded therefrom because of his race; (2) that resort to the union's grievance procedures after 1955 would have been futile because (a) on several occasions he requested the then Local Chairman to take steps to end the discrimination being practiced against him and was told in effect that nothing could or would be done for him; (b) in his opinion a claim for damages for racial discrimination against the union and the railroad was not a

"grievance" of the type contemplated by the laws of the union, and (c) the defendants had been permanently enjoined by the United States District Court for the Western District of Virginia, on February 1, 1956, to refrain from discrimination against Negro yard brakemen in promoting yard brakemen to the position of car retarder operator, from which plaintiff concluded that "the ignoring of this Court ordered injunction by the defendants makes the utter futility of a formal constitutional or administrative request by this individual plaintiff patently obvious."

Both the union defendants and the Railway Company (which had served an answer to the original complaint) served motions to dismiss the amended complaint for failure to state a claim upon which relief can be granted, supported by further affidavits in addition to the ones previously served in support of the union defendants' first motion.

The union defendants' new affidavits categorically denied that plaintiff had ever mentioned such a grievance to his local chairman or had ever been told that nothing could be done for him. Affidavits of all three persons who had served as Local Chairman since the time when plaintiff first became a member of the union were unequivocally to this effect.

An affidavit with the Railway Company's motion set forth the following additional facts: (1) as to the alleged discrimination in promotions to the position of car retarder operator, that there had been no such discrimination; that all such positions had been filled by advertising to all yard brakemen, including the plaintiff, an invitation to apply for permission to qualify as car

retarder operator, to which advertisement plaintiff had never responded by requesting such permission or by attempting to qualify for such position; (2) as to the alleged discrimination in promotions to the position of yard conductor, (a) that plaintiff had not exhausted the administrative remedies prescribed in the applicable collective bargaining agreements; that although he had presented such a claim to the officer of the company authorized to receive the same, he had done so only after expiration of the prescribed time limit, and when his claim was disallowed on this ground as to previous promotions he had taken no appeal within the prescribed appeal period, and (b) that it would not have been futile for plaintiff thus to bring his grievance to the attention of the Railway Company; that when he did present his claim to the officer authorized to receive it, although the claim was disallowed as to previous promotions because barred by the time limit on claims rule, plaintiff was advised that he would be included in the next class of yardmen called up for examination for promotion to the position of yard conductor, and that this had in fact been done, with the result that plaintiff at the time of this affidavit (May 9, 1966) had been promoted to and held seniority in the position of yard conductor.

These motions and supporting affidavits were served eighty-six days before the time when the motions were heard. Within that time plaintiff made no response, either by affidavit or otherwise as provided in Rule 56 of the Rules of Civil Procedure. His speaking motion, made in the course of the hearing, to file an affidavit in support of his amended complaint, was not supported by any affidavit filed pursuant to Rule 56 (f) or by any showing or representation as to what such an affidavit would set forth, by whom it would be made, or why it

was not served before the hearing. This motion was not granted, and the court entered the judgment of which plaintiff now complains.

The Questions Actually Presented for Review

Rather than the questions set forth in the Petition for Certiorari, the questions here presented for review are only these:

I. Did the courts below abuse their discretion in requiring exhaustion of simple administrative procedures as a prerequisite to an action for alleged breach of a union's duty of equal representation, in the absence of any showing that such procedures would be inadequate or ineffective and where it was undisputed that such remedies, when invoked, have been effective to redress the same and other similar grievances?

II. Did the District Court abuse its discretion by refusing to allow the plaintiff to file a late counter affidavit in the absence of any showing or representation as to what facts the affidavit might set forth, who the affiant might be, or any reason for not offering it within the time prescribed by the Rules of Civil Procedure?

Certainly there was never presented either the second or the third question set forth on pages 2 and 3 of the Petition. No one ever contended, and it was surely not held below, that the Labor-Management Reporting and Disclosure Act *requires* exhaustion of administrative remedies. On the contrary, the decision below merely recognizes that this Act by its express terms *refrains from prohibiting* such a requirement. And there was never involved the propriety of any ruling on a motion

for leave to amend a pleading pursuant to Rule 15 (a). The only such motion ever made by the plaintiff was granted. His motion for leave to file a late counter affidavit was not attended by any suggestion that such affidavit would set forth any, much less that it would verify all, of the allegations of his pleading.

ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER COURT

This Court's decision in *Walker* v. *Southern Railway Company*, 385 US 196, 17 L ed 2d 294, 87 S Ct 367 (1966), which was not cited in any brief filed in the Court of Appeals or in the opinion of that Court, has no bearing upon any question decided in this case.

Walker dealt with a minor dispute within the jurisdiction of the Railroad Adjustment Board, and decided that the Board's exclusive primary jurisdiction of minor disputes is still subject to the exception allowed in *Moore* v. *Illinois Central Railroad Company*, 312 US 630, 85 L ed 1089, 61 S Ct 754 (1941). This exception preserves to a former railroad employee who has been discharged by the carrier any right given him by applicable state law to bring an action for wrongful discharge instead of invoking the jurisdiction of the Board to recover both his job and his lost pay. Squarely and solely on the ground that this particular administrative remedy, for reasons pertaining solely to proceedings before the N.R.A.B., involved excessive delays and other disadvantages to the employee, the majority of this Court held that the exceptional rule of *Moore* ought not to be overruled in *Walker's* case.

The present case in no way involves the statutory administrative remedy afforded by the Railway Labor Act, and the delays and other disadvantages peculiar to the Board's procedures cannot be reasons for excusing the present plaintiff's total disregard of a simple intra-union remedy to which he expressly agreed upon joining his union, and simple contract remedies expressly agreed to on his behalf through the applicable collective agreement.

The decision below could not conflict with any decision of any court in respect of any "refusal of the District Court and the Court of Appeals to permit the plaintiff to amend his Amended Complaint by permitting him to file Affidavits and to verify his Amended Complaint", (Petition for Certiorari, p. 14), because this did not occur. This District Court could not refuse leave to amend the Amended Complaint or to verify its allegations because the plaintiff did not request leave to do either.

The District Court's action in overruling plaintiff's unexplained motion for leave to file a late counter affidavit was not a technical decision. The plaintiff's day in court had then extended from March 17, 1965, until August 3, 1966. During the last five months of this time he had been confronted with an opinion of the District Court which explicitly told him that he could not maintain his action unless he could produce evidence of some good reason for having ignored his administrative remedies. For the three months preceding his motion he had been confronted with a direct challenge to show whether he could or could not produce evidence to put in issue the facts set forth in the defendants' affidavits. From the nature of the affidavits it was inherently

unlikely that competent evidence to contradict them could ever be produced, and even the unsworn allegations of his amended pleading did not successfully avoid them. The District Court could only conclude that plaintiff's case was without substance on its merits.

THE COURT BELOW HAS NOT DECIDED ANY IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

The courts below did not, as asserted in the Petition, decide that the Labor-Management Reporting and Disclosure Act controls or limits in any way the right of the plaintiff in such a case to maintain an action at law. No contention that the Act has such effect was or sensibly could be made. The operation of the Act is generally to *prohibit* limitation of the right of any member to sue his union, but with a proviso expressly relieving from this prohibition a requirement that the member shall first exhaust reasonable hearing procedures.

The Fourth Circuit had previously adopted the view that the proviso to Section 411 (a) (4) does not allow the union, as a matter of right, to require exhaustion of proper hearing procedures as a prerequisite to suit against it, but on the contrary merely permits the courts in their discretion to so require. *Simmons* v. *Avisco Local 713, Textile Workers' Union of America,* 350 F 2d 1012 (4th Cir 1965). This being the clearly announced position of the court, the defendants did not raise for decision in this case the question apparent on the face of the Act as to the correctness of this view. The case was therefore decided for the defendants under the view of the law most favorable to the plaintiff, and the only other possible interpretation of the statute could not have affected the decision.

CONCLUSION

Cases may and doubtless will arise in which it is necessary for this court to determine whether a particular state of facts shown in justification for ignoring union and contract grievance procedures is sufficient for that purpose. But here the plaintiff could offer to prove no facts during the sixteen months when his case was before the District Court, and even if the facts set forth in the affidavits tendered in the Court of Appeals had been proved at a trial they would not support his contention that pursuit of his administrative remedies would have been futile. On the contrary it affirmatively appears beyond respectable argument that if plaintiff had invoked the simple grievance procedures available to him those procedures would have been effective.

It would not be easy to construct a case less deserving the attention of this court.

Respectfully submitted,

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